

Families First Coronavirus Response Act (FFCRA)

FAQS for the Child Care Qualifying Reason and Return to School

H.R. 6201, the Families First Coronavirus Response Act (FFCRA), went into effect April 1, 2020 and will apply through December 31, 2020. In addition to other applicable leave available to state employees, H.R. 6201 provides eligible employees who are unable to work or telework due to certain qualifying reasons related to COVID-19 with a period of paid leave. Division E of the FFCRA, the “Emergency Paid Sick Leave Act” (EPSLA) entitles employees to take up to two weeks of paid sick leave for certain qualifying reasons. Also, Division C of the FFCRA, the “Emergency Family and Medical Leave Expansion Act” (EFMLA) permits eligible employees to take up to twelve weeks of expanded Family and Medical Leave for certain qualifying reasons. The law provides that employers who are health care providers or emergency responders may elect to exclude their employees from these provisions. Also, employers can exclude employees who are health care providers or emergency responders from these provisions even if the employer has not excluded its entire agency from the provisions.

The qualifying childcare reason is when a person **unable** to work or telework because they are caring for their child whose school or place of care is **closed** (or childcare provider is **unavailable**) due to COVID-19 related reasons.

1. If an employee is home with their child because their school or place of care is closed, or childcare provider is unavailable, are they entitled to paid sick leave, expanded family and medical leave, or both—how do they interact?

An employee may be eligible for both types of leave, but only for a **total** of twelve weeks of paid leave. An employee may take both paid sick leave and expanded family and medical leave to care for their child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, personal or compensatory leave under their employer’s policy. After the first ten workdays have elapsed, an employee will receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that an employee can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is **closed**, or childcare provider is **unavailable**, due to COVID-19 related reasons.

2. Who is a son or daughter under the FFCRA?

Under the FFCRA, a “son or daughter” is the employee’s own child, which includes their biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or

financially support a child. For additional information about in loco parentis, see Fact Sheet #28B: Family and Medical Leave Act (FMLA) leave for birth, placement, bonding or to care for a child with a serious health condition on the basis of an “in loco parentis” relationship. *See* the U.S. Department of Labor’s Fact Sheet #28B on the U.S. DOL’s website at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28B.pdf> . *See also* 29 U.S.C. § 2611(12) and 29 C.F.R. § 826.10

In light of Congressional direction to interpret definitions consistently, WHD clarifies that under the FFCRA a “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability. For additional information on requirements relating to an adult son or daughter, see Fact Sheet #28K on the U.S. Department of Labor’s website at <https://www.dol.gov/agencies/whd/fact-sheets/28k-fmla-adult-children> . *See also* 29 U.S.C. § 2611(12) and 29 C.F.R. § 826.10

3. What is a “place of care” under the FFCRA?

A “place of care” is a **physical location** in which care is provided for the employee’s child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs. *See* 29 U.S.C. § 2620, 42 U.S.C. § 9858n, 20 U.S.C. § 7801 and 29 C.F.R. § 826.10.

4. Who is a “childcare provider” under the FFCRA?

A “childcare provider” is someone who cares for the employee’s child. This includes individuals paid to provide childcare, like nannies, au pairs, and babysitters. It also includes individuals who provide childcare at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors. *See* 29 U.S.C. § 2620(a)(2)(C), 42 U.S.C. § 9858n, 29 C.F.R. § 826.10(a),

5. How does the FFCRA define school?

A “school” is an elementary or secondary school that is a nonprofit institutional day or residential school, including a public charter school, that provides either elementary education or secondary education, as determined under State law, except that the term does not include any education beyond grade 12. *See* 29 U.S.C. § 2620(a)(2)(D) and 20 U.S.C. § 7801

6. The child’s school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it “closed” according to the FFCRA?

Yes. If the **physical location** where the child receives instruction or care is now **closed**, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or

whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

- 7. The child’s school is operating a hybrid schedule where the students are divided and the students are reporting on alternating days and participating in distancing learning during the days scheduled at home. On what days, if any, are employees entitled to leave under the FFCRA?**

The employee may be entitled to paid sick leave or expanded family and medical leave on the days that the student is required to be at home for distance learning and is not allowed to be physically at the school. The employee is not entitled to leave on the days that the student is required to report to school under the childcare qualifying reason.

- 8. The child’s school is offering parents’ the option of the child attending classes in person at the school or participating via virtual distance learning. If the employee chooses for their child to participate via virtual distance learning even though it is not mandatory, is the employee entitled to paid sick leave or expanded family and medical leave?**

Generally No. If the physical location where the child receives instruction or care is open and the child could attend in person but chooses not to, then the employee is not entitled to leave under the FFCRA. However, if employee qualifies for leave under another qualifying reason or law then employee may still be entitled to leave. See question 11 for more details.

- 9. Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for a child whose school or place of care is closed, or the childcare provider is unavailable, due to COVID-19 related reasons?**

An employee may be eligible to take paid sick leave or expanded family and medical leave to care for your child only when they need to, and actually are, caring for their child if they are unable to work or telework as a result of providing care. Generally, employees do not need to take such leave if a co-parent, co-guardian, or your usual childcare provider is available to provide the care your child needs. See Question 10 for more details.

- 10. May an employee take paid sick leave or expanded family and medical leave intermittently while teleworking?**

Yes, but only with their employer’s permission. Intermittent expanded family and medical leave should be permitted only when the employee and employer agree upon such a schedule. For example, if the employee and employer agree, then the employee may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while their child is at home because their child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of their leave.

The U.S. Department of Labor encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the U.S. Department of Labor supports such voluntary arrangements.

11. What if the employee's child has an underlying condition that prevents the child from attending in person and their doctor has recommended the child attend virtually, is that employee entitled to leave?

Yes, if the child has been advised by a health care provider to self-quarantine due to COVID-19 (qualifying reason #2), then an employee may be eligible for paid sick leave to care for the child because the child is particularly vulnerable to COVID-19 and the provision of care to the child prevents the employee from working or teleworking. Paid sick leave is only for a total of two weeks (80 hours or a part-time employee's two-week equivalent).

The employer should also look at the traditional FMLA requirements and determine whether the employee qualifies for leave under FMLA for an additional ten weeks. The U.S. Department of Labor has FAQs for the traditional FMLA which can be found on their website at <https://www.dol.gov/agencies/whd/fmla/faq>.

12. What if an employee's child has another family member in their household with an underlying condition and that family member's doctor has recommended that the child attend classes virtually to limit exposure to the family member, then is the employee entitled to leave?

Under the FFCRA, an employee may take paid sick leave **to care for** a self-quarantining individual if a health care provider has advised that individual to stay home or otherwise quarantine themselves because they may have COVID-19 or are particularly vulnerable to COVID-19 **and caring for that family member prevents the employee from working or teleworking**. If the family member does not need the employee to care for them, then the employee is not eligible for paid sick leave. Additionally, see question 9 above regarding simultaneous care for a child by guardians.

Also, under the traditional FMLA, to be a qualifying reason, the employee again would be **caring for the immediate family member with a serious health condition**. If the employee is not caring for that family member, but is in fact seeking leave so the child can do virtual learning to prevent exposure to the family member, it does not appear to fit within FMLA. Again, see question 9 above regarding simultaneous care for a child by guardians.